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No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1930

BURNS POE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON

v.

H. G. SEABORN

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COLLECTOR

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BRIEF FOR THE COLLECTOR

OPINIONS BELOW

No opinion has been rendered by the Circuit Court of Appeals for the Ninth Circuit. The decision of the District Court (R. 7) is reported in 32 F. (2d) 916.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on November 26, 1929. On May 26, 1930, this Court granted a joint motion for a writ of certiorari to bring up the entire record and cause. (R. 40.)

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented on the entire record are the same as those certified. These questions are:

> First. May a husband and wife domiciled in the State of Washington make separate returns of community income, each reporting one-half thereof, and pay taxes on such returns, in accordance with the practice which has prevailed in that State for the past eight years under the rulings and sanction of the Attorney General, the Secretary of the Treasury and other taxing officers of the Government? Or, putting the question in another form—
>
> Second. Must the husband make return and pay the tax on the entire community income of the husband and wife in that State, as suggested, if not decided by the Supreme Court in *United States* v. *Robbins,* 269 U. S. 315?

STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra,* pp. 45–59.

STATEMENT

There is no dispute as to the facts in this case, a jury trial having been waived in writing and the trial court having found the facts to be as stipulated by the parties.

The appellee was married December 11, 1902, and has lived with his wife continuously since that time, being domiciled in the State of Washington. Neither had any property or pecuniary rights at

the time of their marriage and neither has since acquired any property or pecuniary rights by gift, bequest, devise, descent, or inheritance. (R. 20.)

During and prior to the year 1927 the appellee and his wife accumulated a considerable amount of property in the State of Washington, consisting of real estate located in that State, stocks, bonds, and other personal property. (R. 20.) The personal property was held in the name of the appellee and the record title to the real estate was in his name. It is agreed by the parties that all of the property in question constitutes community property under the laws of the State of Washington. (R. 20–21.)

The income of the appellee and his wife for the year 1927 consisted of the following items (R. 21):

Salary of respondent as an officer and employee of a corporation	$15,000.00
Interest on bank deposits, notes, and corporation bonds	12,881.06
Dividends on stocks of domestic corporations	8,834.57
Profit from sale of real estate, stocks, and bonds	606.59
Profit on sale of boat	500.00
Profit on Cities Service joint venture	625.95
Total	$38,448.17

None of the income listed above represented rents, issues, or profits from property owned by husband or wife at the time of their marriage or from property acquired by either of them subsequently by gift, devise, or inheritance. (R. 21.)

The income in question was reported in the separate returns filed by the appellee and his wife, one-half being reported in the return of each. Each return showed deductions representing one-half of

the total of $12,171.45 composed of the following items (R. 21):

Interest paid	$9,097.51
Taxes paid	782.26
Charitable contributions	1,716.68
Earnest money forfeited	250.00
Bad debt allowance	325.00

Each return showed a net income of $13,138.36. The appellee's return disclosed a tax liability of $152.38, and his wife's a tax liability of $168.32, both of which sums were duly paid. (R. 21, 22.)

Upon the audit of the returns the Commissioner of Internal Revenue determined that all of the income of the appellee and his wife should have been reported in the appellee's return and all the deductions claimed by him. The appellee paid under protest the additional assessment of $703.01 made against him on that theory, and upon the rejection of his claim for refund which was duly filed instituted this suit. (R. 22–23.)

The District Court held that under the laws of the State of Washington each of the spouses had an equal vested interest in the community income and that the community income was properly divided between them in separate returns. (R. 24.) From judgment in behalf of the plaintiff the Collector appealed to the Circuit Court of Appeals which, on November 26, 1929, filed its certificate with this Court. On May 26, 1930, this Court ordered the whole record to be sent up. (R. 40.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In not holding that under the laws and judicial decisions of the State of Washington the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins,* 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds

[1] The following material to stars on p. 7 is common to all our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

Sections 210 and 211 of the Revenue Act of 1926, *infra*, p. 45, construed as similar provisions were construed in the *Robbins case*, do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with respect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married tax-

payers residing in the community property States an undue advantage over married taxpayers residing in other States.

* * * * *[2]

Under the laws and judicial decisions of the State of Washington the husband, in addition to having a vested interest in the community property equal in all respects to his wife's interest, has full powers of management as to community personalty and substantial powers as to community realty but can not convey, mortgage, or lease the latter without the wife's consent. The only important restriction on his powers is that he can not give away a substantial amount of community property or fraudulently sequester it. This restriction is of little practical benefit to the wife for the reason that she can not (without securing a divorce) have her share of the community property removed from her husband's control or force him to give her one-half or any other portion of the community income.

While the community property is not made liable for the separate debts or torts of either, it is liable for the payment of obligations of the husband and the torts of the husband when such obligations are incurred or such torts are committed in the management of community affairs, and presumptively every act of the husband is undertaken for the benefit of the community.

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[2] See Footnote 1, p. 5.

The wife's vested interest in the community property is no more than a right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property with the right in the interim to have the property devoted to such purposes as are in the honest judgment of the husband appropriate for the advancement of community interests. She has no positive powers of control and can not, to any substantial degree, interfere with the broad powers of control given to her husband.

The husband accordingly is the spouse having the right to control and manage the community property in Washington and should be made liable for Federal income tax on the entire community income. This requirement is the more reasonable in view of the fact that under the philosophy of the community property system in that State the community is a legal unit and in view of the further fact that the husband as well as the community is liable on all contracts which he makes for the community.

ARGUMENT

I

PRELIMINARY STATEMENT [3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298,

[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico, and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

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[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 46. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the commencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

II

Where the Husband Has Control Over and the Right to Enjoy the Entire Community Income He Is Required to Include It in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words. There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

the definitions of property rights and titles vary with the local laws. The view originally held in the Treasury Department and in the Department of Justice, T. D. 3071 (*supra;* T. D. 3138, *supra;* 32 Op. A. G. 298, 435, *supra*) that the wife has an interest in income from community property equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control and not in any narrow, technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income "*of every individual.*" (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1062, the statute involved in the *Robbins*

case, supra, and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 45.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax thereon. The tax is imposed upon the income of individuals, and the application of this language to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, §§ 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and

> if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas,* 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole.* For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, § 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. § 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers,* 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual

> command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271. *Chase National Bank* v. *United States,* 278 U. S. 327. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 45, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case,* do not require the taxa-

tion of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case,* as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is distributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case.* Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of

dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition of the fund; that he might spend it substantially as he chose, and that if he wasted it in debauchery, the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between

taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights and powers of individual taxpayers in controlling and disposing of income received. "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Washington, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated. The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 265 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309.

The test that he who has the power of disposition should bear the burden of the tax finds support in

the general language of the statute and so to construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins*, 269 U. S. 315; *Corliss* v. *Bowers*, 281 U. S. 376; *Tyler* v. *United States*, 281 U. S. 497; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Washington and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

III

Under the Laws and Judicial Decisions of the State of Washington the Husband's Interest in the Community Income Is Such That He Should Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such That She Should Be Permitted to Report One-half of the Community Income in Her Return [6]

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[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights of the husband and wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal, even with his own property, universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her support after his death. Thus a limited right in the wife to bind the community by contracts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 53, and cases cited. Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 6285. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This gives the wife no greater right (except as to the amount) than she has in Oklahoma where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224 of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate and even those States protect the wife's interest in the homestead. In practically all States, provisions which give to the wife the assur-

ance of receiving a certain proportion of the husband's real estate upon his death are accompanied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss case,* to "actual command" of the income taxed, so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such

expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes, but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an express provision of the early Saxon law, or from the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du

Palais Repertoire, verbo, communaute', 739, 741, *et seq.*)

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Washington which disclose the rights of the spouses to control and enjoy community property and its income.

* * * * * [7]

The community property system was not native to Washington but was adopted by legislation and in many respects resembles the system of California, from which it was, in part, copied. *Warburton* v. *White,* 176 U. S. 484; *Spreckles* v. *Spreckles,* 116 Cal. 339; McKay on Community Property, Sec. 6. On the other hand, there has been developed in the State of Washington a theory of the community as a separate legal entity which is not recognized in the same form in California or the other States having the community property system. *Holyoke* v. *Jackson,* 3 Wash. T. 235; *Schramm* v. *Steele,* 97 Wash. 309; McKay on Community Property, Secs. 163–171, 1172, 1183, 1184. Thus it is said that the community is "a legal entity in which the individuality of both spouses is merged,

[7] See Footnote 6, p. 18.

in so far as the ownership of property acquired by either after marriage is concerned," and that "the title to property so acquired vests in such legal entity." *Ostheller* v. *Spokane & Inland Empire R. Co.,* 107 Wash. 678, 685. In *Mattinson* v. *Mattinson,* 128 Wash. 328, it was held that a wife as an individual might sue her husband to recover out of the community a loan made to the husband from her separate funds and presumably for the use of the community. This theory is in conflict with the theory that the husband and wife each has a vested one-half interest in the community property (*Warburton* v. *White, supra,* and *Rucker* v. *Blair* 32 F. (2d) 222 (C. C. A. 9th), and cases cited), but has influenced the course of judicial decision as to the management and control of the community property.

(A)

THE HUSBAND IS GIVEN COMPLETE AND EXCLUSIVE POWER DURING OVERTURE TO DISPOSE OF COMMUNITY PERSONAL PROPERTY, TO BIND THE COMMUNITY BY CONTRACTS CONCERNING IT, AND TO SUE AND BE SUED IN REGARD TO IT

Section 6892, Compiled Statutes, *infra.*

Way v. *Lyric Theater Co.,* 79 Wash. 275.

Catlin v. *Mills,* 140 Wash. 1.

Bellingham Motors Corp. v. *Lindberg,* 126 Wash. 684.

Maynard v. *Jefferson County,* 54 Wash. 351.

Schramm v. *Steele,* 97 Wash. 309.

Section 6892 of the Compiled Statutes of Washington, *infra,* gives the husband the exclusive and

complete right to manage, control, and dispose of community personal property with the qualification that he can not devise by will more than one-half of such property.

The Supreme Court of the State has given full effect to the provision placing the management, control, and disposition of community personal property in the hands of the husband alone.

The test as to whether his contracts relating to personal property bind the community is whether they were made in the course of his management for the benefit of the community, and not whether they were of actual benefit to the community. *Way* v. *Lyric Theater Co., supra; Catlin* v. *Mills, supra; Henning* v. *Anderson,* 121 Wash. 53; *American Surety Co.* v. *Sandberg,* 244 Fed. 701 (C. C. A. 9th).

In applying the test the Supreme Court of Washington has gone very far in upholding the husband's right to bind the community by the contracts which he makes and the obligations which he assumes. The wife's protests against his contracts do not prevent the community from becoming liable. *Bellingham Motors Corp.* v. *Lindberg, supra.*

For example, in *Henning* v. *Anderson, supra,* it was held that the husband's note given for the benefit of the corporation in which the community held stock was a community debt even though it was given to the president of the corporation who absconded without applying the proceeds to the use of the corporation for which it was intended. See also *Kuhn* v. *Groll,* 118 Wash. 285; *In re Levinson*

and Greene v. *Booth,* 1 F. (2d) 851 (C. C. A. 9th), certiorari denied as to *Greene* v. *Booth,* 267 U. S. 598.

Catlin v. *Mills,* 140 Wash. 1, *supra,* was a case where the husband executed a note and gave a mortgage on community property and later made a payment on the note after the statute of limitation had run. The court there held that in making the payment he was acting for the benefit of the community, that his payment revived the right of action on the note, and that the community was bound to pay the debt.

The husband without joinder of the wife may sue or be sued with reference to community personal property. *Maynard* v. *Jefferson County,* 54 Wash. 351, *supra.*

(B)

THE HUSBAND HAS THE MANAGEMENT AND CONTROL OF THE COMMUNITY REAL ESTATE AND MAY BIND THE COMMUNITY BY HIS CONTRACTS RELATING TO IT EXCEPT THAT HE MAY NOT SELL, CONVEY, OR MORTGAGE IT WITHOUT HIS WIFE'S CONSENT

Section 6893, Compiled Statutes, *infra.*

Littell & Smythe Mfg. Co. v. *Miller,* 3 Wash. 480.

Anderson v. *National Bank of Tacoma,* 146 Wash. 520.

Pain v. *Morrison,* 125 Wash. 267.

The husband's control over the community real estate is also substantial, notwithstanding the fact that he is prohibited by statute from selling, conveying, or encumbering it without her consent.

For example, he can contract for the erection of buildings on community land and subject it to mechanic's liens, *Littell & Smythe Mfg. Co.* v. *Miller,* 3 Wash. 480, although the wife is a necessary party in a suit to foreclose the lien. In the latter case the court said (pp. 482-483):

> The management and control of the community real property is given to the husband, and the statute speaks as though he is the only member of the community who, acting alone, can create a charge against the same for improvements, and it plainly implies that he may do so, and also create debts against the community otherwise, independent of any action upon the part of the wife, by virtue of which a judgment lien may be obtained upon the community lands. It also provides that such lands may be sold on execution issued upon a judgment for a community debt, and, if it means anything, it must mean that such debts may be created by the husband independent of any specific appointment of him by the wife as her agent to represent her in community matters, and without any participation by her in the contract.
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> * * * * *
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> No such powers seem to be given to the wife generally in relation to the community matters. She is only spoken of in this section as in connection with the limitation upon the husband's power to sell or convey or to encumber otherwise than as is specified in the provision therein.

It is also well settled that while the husband can not make a lease for more than one year without his wife's consent, *Spreitzer* v. *Miller,* 98 Wash. 601; *Hinkhouse* v. *Wacker,* 112 Wash. 253; *Kaufman* v. *Perkins,* 114 Wash. 40, he may assign a lease for any term. *Tibbals* v. *Iffland,* 10 Wash. 451. Similarly, in *Anderson* v. *National Bank of Tacoma,* 146 Wash. 520, *supra,* it was considered that the husband's assignment of overdue rentals, which constituted mere choses in action, passed all of the interest of the community without the signature or assent of the wife.

In *Atwood* v. *McGrath,* 137 Wash. 400, it was held that since a sheriff's certificate of sale does not vest title, the purchaser can assign the same as community personal property and without his wife joining therein, a certificate of sale being at most but evidence of an inchoate estate that may or may not ripen into an absolute title.

In *Pain* v. *Morrison,* 125 Wash. 267, *supra,* a conditional contract for the sale of community land was treated as personal property of which the husband had the lawful right to dispose in the prosecution of the affairs of the community, independently of any power or authority of the wife. On the other hand, an executory contract for the sale of land to a married man does not confer title to the land upon the community until fully performed and may be forfeited by failure of the husband to comply with the conditions of the contract. The wife is without remedy and can not complain of the forfeiture. *Converse* v. *LaBarge,* 92 Wash. 282.

The husband alone may sue for a breach of contract which if performed would have tended to increase the value of the community estate. *Belt* v. *Washington Water Power Co.*, 24 Wash. 387. He is the necessary party to all suits affecting the interests of the community. *Conley* v. *Greene*, 89 Wash. 39, *Belt* v. *Washington Water Power Co., supra.*

(C)

THE COMMUNITY PROPERTY IS LIABLE FOR ALL DEBTS INCURRED BY THE HUSBAND AND ALL TORTS COMMITTED BY HIM IN THE PROSECUTION OF COMMUNITY AFFAIRS AND THE PRESUMPTION IS THAT DEBTS INCURRED BY HIM AND TORTS COMMITTED BY HIM ARE CONNECTED WITH HIS MANAGEMENT OF THE AFFAIRS OF THE COMMUNITY

Vanderveer v. *Hillman*, 122 Wash. 684.
De Phillips v. *Neslin*, 139 Wash. 51.
Peacock v. *Ratliff*, 62 Wash. 653.
Denis v. *Metzenbaum*, 124 Wash. 86.

It is recognized that the community property is not liable for the separate debts of the husband. *Schramm* v. *Steele, supra; Huyvaerts* v. *Roedtz*, 105 Wash. 657. Nor is it liable for torts committed by the husband which were not committed in the prosecution of community affairs. *Schramm* v. *Steele, supra; Coles* v. *McNamara*, 131 Wash. 691.

The converse is also true. Every debt which is incurred by the husband in the prosecution of community affairs and every tort which is committed

by him when so engaged constitute a liability of the community. Furthermore, it is the rule that every debt incurred by the husband during the existence of the community is *prima facie* a community debt. *Calhoun* v. *Leary*, 6 Wash. 17; *Peacock* v. *Ratliff*, *supra*; *American Surety Co.* v. *Sandberg*, 244 Fed. 701 (C. C. A. 9th). Every contract entered into by the husband during the existence of the community is presumably for the benefit of the community. *Johns* v. *Clother*, 78 Wash. 602; *Peacock* v. *Ratliff*, *supra*. A husband in carrying on a business for profit is *prima facie* acting for the interest of both himself and his wife and a debt incurred in such business is *prima facie* a debt for which the community is liable. *Henrickson* v. *Smith*, 111 Wash. 82; *Yakima Trust Co.* v. *Zintheo*, 135 Wash. 389.

The community's liability for the husband's torts committed in the prosecution of community affairs is well established. In *Milne* v. *Kane*, 64 *Wash.* 254, the community was held liable to a passenger for the tort of the husband in negligently driving an automobile for hire where the automobile was operated for the benefit of the community. In *Vanderveer* v. *Hillman*, 122 Wash. 684, *supra*, it was held that the employment of an attorney to defend a civil suit involving the protection of community property, and a criminal prosecution resulting directly from acts of the husband in dealing with the community property, created a community debt. In *De Phillips* v. *Neslin*, 139 Wash.

51, *supra*, it was held that the community was liable for slander committed by the husband and his agents in charging an employee with larceny with a view of obtaining restitution of funds of a business belonging to the community; also for assault on the employee and malicious prosecution.

(D)

THE WIFE CAN NOT WITHOUT HER HUSBAND'S CONSENT MAKE ANY VALID CONTRACT IN REFERENCE TO COMMUNITY PERSONAL PROPERTY OR COMMUNITY REAL ESTATE; NOR IS THE COMMUNITY PROPERTY LIABLE FOR HER DEBTS OR TORTS EXCEPT THE DEBTS SHE MAY CONTRACT FOR NECESSITIES

Sections 6892, 6893, Compiled Statutes, *infra*.

Hammond v. *Jackson*, 89 Wash. 510.
Palmer v. *McBride*, 115 Wash. 404.
Marston v. *Rae*, 92 Wash. 129.
Killingsworth v. *Keen*, 89 Wash. 597.
Bulkeley v. *Grulimund*, 92 Wash. 326.

It is evident that under Sections 6892 and 6893 of the Compiled Statutes, *infra*, no affirmative control over community property has been given to the wife and that the only negative control given to her is the right to prevent her husband from selling, conveying, or mortgaging real property without her consent and from disposing of more than one-half of the community personality in his will. As previously pointed out, similar restrictions will be found in States which do not have a community property law.

The Supreme Court of the State of Washington has shown no disposition to construe these provisions liberally in order to give the wife positive powers of control.

The general rule is that the wife has no power to make a valid contract in reference to community property, whether real or personal. *Blum* v. *Smith,* 66 Wash. 192; *Hammond* v. *Jackson, supra; Palmer* v. *McBride, supra.* She can not sell or convey or mortgage community real estate. *Palmer* v. *McBride, supra; Olson* v. *Springer,* 60 Wash. 77. The case of *Williams* v. *Beebe,* 79 Wash. 133, which apparently laid down the rule that the wife could enter into a valid lease of community property even without her husband's consent, has been overruled by *Hammond* v. *Jackson, supra,* and *Balkema* v. *Grolimund, supra.*

The exceptions which have been made have merely served to strengthen the general rule. Section 6908 of the Compiled Statutes, *infra,* makes her liable with her husband for family expenses. Accordingly, the wife may purchase necessities to be used in the household and may bind the community to pay rent of a dwelling. *Bowers* v. *Good,* 52 Wash. 384, 389; *Strom* v. *Toklas,* 78 Wash. 223; *Jones, Rosquist, Killen Co.* v. *Nelson,* 98 Wash. 539. Similarly, when she has been deserted by her husband and there is actual necessity for so doing, she may sell community personal property. *Marston* v. *Rue, supra.* In the case last cited the Supreme Court of Washington, in holding valid the

wife's sale of an automobile after desertion by her husband, indicated that the case was an exceptional one and stated that ordinarily a person purchasing community property from the wife did so "at his own peril."

The only other exceptions generally recognized as to the wife's power to contract with reference to community property grow out of the principles of estoppel and ratification. Thus, where the husband either by express authorization, by giving the wife a power of attorney to manage community business, or by subsequent ratifications or acquiescence, approves the contract, a contract made by the wife with respect to community property can be enforced. *Bowers* v. *Good, supra; Grote-Rankin Co.* v. *Brownell,* 76 Wash. 335; *Balkema* v. *Grolimund,* 92 Wash. 326, *supra; Fielding* v. *Ketler,* 86 Wash. 194.

Not only does the wife under ordinary circumstances have no power to make a valid contract with reference to community property, but any contract which she makes is presumptively a contract as to her separate property and may be enforced against her individually. *Balkema* v. *Grolimund, supra.* In *Jones, Rosquist, Killen Co.* v. *Nelson, supra,* it was held that the wife's purchase of a piano without her husband's knowledge constituted her separate contract, upon which she and not the community was liable. Where the wife's contract is one of purchase, there is a conflict between the presumption that she makes contracts

only with respect to her separate property and the presumption that all property purchased during coverture by either spouse is community property. *In re Finn's Estate,* 106 Wash. 137.

Not only has the wife no power generally to contract with reference to community property but she has no power to enforce or collect a community claim. She may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right when such earnings are her separate property or are earned while living apart from her husband. Sections 6895 and 6896 of the Compiled Statutes, *infra; Foy* v. *Pacific Power & Light Co.,* 105 Wash. 525. No such earnings are involved in this case. (R. 21.)

In *Schneider* v. *Biberger,* 76 Wash. 504, it was held that the wife could not recover damages for personal injuries which she herself had sustained, for the reason that the claim was community property. Nor may she alone sue where the husband refuses to join as a party.[8] *Hynes* v. *Colman Dock Co.,* 108 Wash. 642. While she may join with her husband in such cases by virtue of Sections 181 and 182 of the Compiled Statutes, *infra,* she is not a necessary party. *Maynard* v. *Jefferson County,* 54 Wash. 351; *Hynes* v. *Colman Dock Co., supra.* Only after the husband has repudiated his rights and duties by deserting his wife may she alone in-

[8]An exception is also made in Sec. 7348, *infra*, as to damages caused by an intoxicated person.

stitute such an action. *Wampler* v. *Beinert,* 125 Wash. 494.

The community property is not liable for the separate debts of the wife or for her torts, except perhaps in cases where they are committed in the transaction of community business which she has been authorized to transact by her husband. Section 6904, *infra; Killingsworth* v. *Keen,* 89 Wash. 597; *Strom* v. *Toklas,* 78 Wash. 223, *supra.* See also *Schramm* v. *Steele, supra.*

(E)

THE WIFE CAN NOT RESTRAIN HER HUSBAND IF HE MISMANAGES THE COMMUNITY PROPERTY, OR REMOVE ANY PART OF IT FROM HIS CONTROL WITHOUT SECURING A DIVORCE; IF SHE DOES SECURE A DIVORCE, SHE DOES NOT NECESSARILY RECEIVE ONE-HALF OF THE COMMUNITY PROPERTY

Section 989, Compiled Statutes, *infra.*

Bellingham Motors Corp. v. *Lindberg, supra.*

Parker v. *Parker,* 121 Wash. 24.

Daniel v. *Daniel,* 106 Wash. 659.

Normile v. *Denison,* 109 Wash. 205.

From the foregoing decisions it is clear that the community is made liable for the torts of the husband committed in connection with community affairs and that it is made equally liable on his contracts relating to community property except as to contracts relating to conveyances, leases, or mortgages of real estate. The wife can not by protest prevent the community realty or personalty from

being made subject to his contracts, however ill-advised they may be. Nor can she prevent the value of her interest in the community fund from being diminished by his mismanagement, *Floding* v. *Denholm,* 40 Wash. 463; *Bellingham Motors Corp.* v. *Lindberg, supra,* but she may prevent his making an assignment of his wages. Section 7598, *infra.*

The right which she has to devise a one-half interest in the community property by will under Section 1342 of the Compiled Statutes, *infra,* does not operate as a check on her husband's powers of management. It is well settled that all that either spouse may devise by will is his or her undivided share in the community property in existence at the time of his or her death. *Daniel* v. *Daniel, supra; In re Hart's Estate,* 150 Wash. 482.

The only important restriction of the husband's power which exists even in theory is that he can not give away a substantial amount of community property or fraudulently sequester community property. *Parker* v. *Parker, supra; Marston* v. *Rue, supra; Stewart* v. *Bank of Endicott,* 82 Wash. 106. This restriction has probably not grown out of a desire to protect the wife's interest in the community property so much as it has been the consequence of the theory that the community is a legal entity possessing certain assets which must be devoted to its own use. The same restriction exists in California. *United States* v. *Robbins, supra.*

As a practical matter this restriction is of little benefit to the wife during the existence of the community. No case has been found in which the Supreme Court of Washington has held that, by a suit in equity or otherwise, a wife could wrest from her husband his control because of his extravagance, mismanagement, or negligence. Nor has any decision been found which holds that she may force him to give her one-half or any other portion of the community income. It is possible that, upon separation from her husband, the wife may be able to maintain an equitable action for separate maintenance, *Motley* v. *Motley,* 117 Wash. 234, but in such an action she sues for and, if successful, receives *maintenance* and *does not have appropriated to her use a particular share of the community income* or property. The amount awarded her may or may not be ordered to be paid from community income.

The husband is not in any case required to account to her for community property which he has given away or sequestered until the community is dissolved by a divorce or in some other method prescribed by law. *Barkley* v. *American Sav. Bank & Trust Co.,* 61 Wash. 415; *Daniel* v. *Daniel,* 106 Wash. 659, *supra; Normile* v. *Denison,* 109 Wash. 205, *supra.* So long as the wife lives with her husband she is without the means of interfering with his management of the community property. Even when the community is dissolved by divorce, she may not be sure of receiving one-

half of the community property. The court in such case has power to make such division of the community and separate property as appears just and equitable. *Nelson* v. *Nelson,* 131 Wash. 646. Where the property can not be divided without loss the court may award it all to the husband and order him to pay alimony to the wife. *Powell* v. *Powell,* 66 Wash. 561.

(F)

SUMMARY

From the foregoing it must be concluded that as a practical matter the wife's interest in the community property is no more than the right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property, with the right in the interim to have the property devoted to such purposes as in the honest judgment of the husband will be beneficial to the community. She can not interfere with his contracts or bind the community by her own contracts except as to family necessities.

On the other hand, the husband, in addition to having an interest in the community equal in all respects to his wife's interest, has full power of management as to community personalty and can enter into any contract regarding community real property except that he must secure his wife's consent in conveying, mortgaging, or leasing real estate. The only material restriction on his powers which exists even in theory is

that he can not give away a substantial amount of community property or fraudulently sequester it. This limitation, however, does not confer any right on the wife so long as she lives with her husband, for she can not (without securing a divorce) have her share of the community property removed from the husband's control or force him to give her one-half or any other portion of the community income.

While the community property is not made liable for the separate debts or torts of either the husband or wife, it is liable for the payment of the obligations of the husband and the torts of the husband when such obligations are incurred or such torts are committed in the management of community affairs, and presumptively every act of the husband is done for the benefit of the community. He also is the necessary party in all actions affecting the community.

Thus while the powers of the husband over the community property in Washington may not be precisely the same as they were in California when the *Robbins case* arose, the Washington husband is the spouse who exercises all substantial control over the community property in that State, and under the decision in the *Robbins case* he should be taxed on the entire community income.

It may be claimed that the rights exercised by the husband are not different from those exercised by an agent and that an agent is not taxed upon the income of his principal. In its certificate in this case the Circuit Court of Appeals said (p. 2):

> It is likewise the established rule of decision in that State [Washington] that the power given to the husband of management and control of the community personal property is a naked power in trust for the community. It is not a power coupled with an interest and gives the husband no proprietary right or interest in the one-half of the community property, real or personal, which belongs to the wife. It differs in no respect from an agency created by a general power of attorney or other contract of agency. *Holyoke* v. *Jackson,* 3 Wash. Ter. 235; *Schramm* v. *Steele,* 97 Wash. 309.

It is true that the husband is often spoken of as the agent of the community and his power has been termed "a naked trust" for the community. In addition to the cases cited in the certificate, see *Warburton* v. *White, supra; Marston* v. *Rue, supra; Catlin* v. *Mills, supra;* and *Anderson* v. *National Bank of Tacoma,* 146 Wash. 520. This is a characteristic expression with respect to community property systems in general and is made in other jurisdictions. *Kohny* v. *Dunbar,* 21 Idaho 258; *La Tourette* v. *La Tourette,* 15 Ariz. 200; *Reade* v. *de Lea,* 14 N. Mex. 442.

But no court has gone so far as to say that under the Washington laws the husband manages the community property as agent for the wife. *Littell & Smythe Mfg. Co.* v. *Miller,* 3 Wash. 480, *supra,* p. 27. The rights of the parties are defined by statute and judicial decisions and are quite inconsistent with the strict relationship of principal and agent.

Under these circumstances we submit that expressions in opinions which speak of the husband as the representative or agent of the community are limited and controlled by statutes and decisions which fix and determine the legal characteristics of the relationship and from which it appears that the community composed of himself and his wife can exercise no authority over him as a principal. Nor can the wife be thought of as principal, in view of her complete exclusion from control and management. She can not even revoke the agency as to her share of the community property. This is not the usual rule of agency. *Shawver* v. *Ewing,* 1 F. (2d) 423 (C. C. A. 8th), certiorari denied, 267 U. S. 601.

Again, the husband may be prohibited from deliberately defrauding his wife of the community estate but unlike an agent he is not required to use ordinary care in discharging his duties. In *McElroy* v. *Hooper,* 70 Wash. 347, it was said that in Washington the community profits by the husband's good judgment and "must bear the loss of his mistakes." No accounting can be asked of him during the existence of the agency, whereas an agent is accountable to his principal. *Smokeless Fuel Co.* v. *Western United Corporation,* 19 F. (2d) 834 (C. C. A. 4th).

The property involved in the present litigation—that is, the income accruing to the community during the year 1927—is personal property over which the husband has "the management and control

* * * with a like power of disposition as he has of his separate personal property, except that he shall not devise by will more than one-half thereof." Section 6892 of the Compiled Statutes, *infra*. It may well be said that if Congress has failed to deal with this income from the viewpoint of the practical results which flow from dominion and control it has in this instance departed from the theory that "taxes are very real things and statutes imposing them are estimated by practical results." *Nichols* v. *Coolidge*, 274 U. S. 531, 541.

The practical difficulties incident to the assessment and collection of the tax, if it is to be assessed against the wife, are obvious. *United States* v. *Robbins, supra*. The wife can not pay the tax assessed against her out of the income taxed. She has no power to appropriate any of the community property to the payment of the tax and to collect it out of her separate property, if she has any, is quite inconsistent with the scheme of the community laws.

The case is not to be decided according to the extent of the negative control of the wife over the community property, or her technical present interest in it, or the ultimate rights which may vest upon dissolution of the community. Neither the corpus of the community property nor the rights of the respective spouses is the subject of the tax. The tax is based on the current receipt of income which under the local statute is subject to the management and control of the husband with a like power of disposition as he has

of his separate estate except that he may not dispose of more than half thereof by will.

CONCLUSION

It is therefore urged that the judgment of the District Court for the Western District of Washington should be reversed.

Respectfully submitted.

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SEPTEMBER, 1930.

APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides in part, as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)
>
> SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *. (U. S. C. App., Title 26, Sec. 952.)
>
> SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such in-

come shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964 a.)

WASHINGTON STATUTES

Remington's Compiled Statutes of Washington, 1922, provide in part as follows:[1]

SEC. 181. HUSBAND AND WIFE MUST JOIN.—EXCEPTION.—When a married woman is a party, her husband must be joined with her, except—

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;

2. When the action is between herself and her husband, she may sue or be sued alone;

3. When she is living separate and apart from her husband, she may sue or be sued alone.

SEC. 182. WHEN HUSBAND AND WIFE MAY JOIN.—Husband and wife may join in all causes of action arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or arising out of any contract in favor of either or both of them. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also. And she may defend in

[1] Where there is no indication to the contrary all of the provisions quoted herein also appeared in the Code of 1881 or were enacted between 1881 and 1902, the date of the marriage of the respondent and his wife.

all cases in which she is interested, whether she is sued with her husband or not.

SEC. 570. SEPARATE PROPERTY OF WIFE EXEMPT.—All real and personal estate belonging to any married woman at the time of her marriage, and all which she may have acquired subsequently to such marriage, or to which she shall hereafter become entitled in her own right, and all her personal earnings, and all the issues, rents and profits of such real estate, shall be exempt from attachment and execution upon any liability or judgment against the husband, so long as she or any minor heir of her body shall be living: Provided, that her separate property shall be liable for debts owing by her at the time of her marriage.

SEC. 989. DECREE—DISPOSITION OF PROPERTY.—In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.

SEC. 1145. COMMUNITY INTEREST, HOW SUBJECTED.—The claim of lien, when filed as required by this chapter, shall be notice to the husband or wife of the person who appears of record to be the owner of the property

sought to be charged with the lien, and shall subject all the community interest of both husband and wife to said lien.

SEC. 1342. DESCENT OF COMMUNITY PROPERTY.—Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

SEC. 1370. COMMUNITY INTERESTS.—This act shall apply to community real property and also to separate estate; and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in section 1342, subject to all the charges mentioned in section 1366 of this act.

SEC. 1419.[2] COMMUNITY PROPERTY, HOW ADMINISTERED.—A surviving spouse shall be

[2] Enacted in 1917.

entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property. If any person, other than the surviving spouse, make application for letters testamentary on such property, prior to the expiration of such forty days, then the court, before making any such appointment, shall require notice of such application to be given the said surviving spouse, for such time and in such manner as the court may determine, unless such applicant show to the satisfaction of the court that there is no surviving spouse or that he or she has in writing waived the right to administer upon such community property.

SEC. 6890. SEPARATE PROPERTY OF HUSBAND.—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

SEC. 6891. SEPARATE PROPERTY OF WIFE.—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 6892. COMMUNITY PROPERTY DEFINED—HUSBAND'S CONTROL OF PERSONALTY.—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

SEC. 6893. COMMUNITY REALTY, CONVEYANCE OF, ETC.—The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: *Provided, however,* That all such community real estate shall be subject to the liens of mechanics and others for labor and

materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.

SEC. 6894. AGREEMENTS AS TO STATUS OF.—Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposititon of the whole or any portion of the community property, then owned by them or afterward to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however,* That such agreement shall not derogate from the rights of creditors nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party.

SEC. 6895. SEPARATE EARNINGS OF WIFE, ETC.—A wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and

defend all actions at law for the preservation and protection of her rights and property as if unmarried.

SEC. 6896. EARNINGS OF WIFE AND MINOR CHILDREN.—The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

SEC. 6900. MARRIED PERSONS MAY ACQUIRE AND HOLD PROPERTY, HOW.—Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if he or she were unmarried.

SEC. 6901. CIVIL DISABILITIES OF WIFE ABOLISHED.—All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has: Provided always, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law.

SEC. 6902. CONTRACTS AND LIABILITIES OF WIFE.—Contracts may be made by wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner as if she were unmarried.

SEC. 6903. MAY SUE EACH OTHER.—Should either husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried.

SEC. 6904. INJURIES COMMITTED BY MARRIED WOMAN, LIABILITY FOR.—For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in case where he would be jointly responsible with her if the marriage did not exist.

SEC. 6905. ANTENUPTIAL AND SEPARATE DEBTS.—Neither husband nor wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other.

SEC. 6906. FAMILY EXPENSES, LIABILITY FOR.—The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

SEC. 6908.[3] FAMILY DESERTION.—Every person who—

1st. Having any child under the age of sixteen years dependent upon him or her for care, education or support, deserts such

[3] Enacted in 1913.

child in any manner whatever, with intent to abandon it;

2d. Willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his or her child or children or ward or wards;

3d. Having sufficient ability to provide for his wife's support, or who is unable to earn the means for such wife's support, who willfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter, or medical attendance, unless by her misconduct he is justified in abandoning her,

Shall be guilty of a gross misdemeanor.

SEC. 7348.[4] ACTION FOR INJURIES CAUSED BY INTOXICATED PERSON.—Every husband, wife, child, parent, guardian, employee, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication of such person, for all damages sustained, and the same may be recovered in a civil action in any court of competent jurisdiction. On the trial of such action, the plaintiff or plaintiffs must prove that such intoxicating liquors were sold under circumstances sufficient to lead a man

[4] Enacted in 1905.

of ordinary intelligence to believe that such sale would probably result in intoxication. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use, and all damages recovered by a minor under this chapter shall be paid either to such minor or to such person in trust for him, and on such terms as the court may direct. In case of the death of either party, the action and right of action to or against his executor or administrator shall survive.

SEC. 7598.[5] MARRIED MAN—CONSENT OF WIFE NECESSARY.—No assignment of, or order for, wages to be earned in the future shall be valid, when made by a married man, unless the written consent of his wife to the making of such assignment or order is attached thereto.

SEC. 10572. CONVEYANCES BETWEEN HUSBAND AND WIFE.—A husband may give, grant, sell, or convey directly to his wife, and a wife may give, grant, sell, or convey directly to her husband his or her community right, title, interest, or estate in all or any portion of their community real property. And every deed made from husband to wife, or from wife to husband, shall operate to divest the real estate therein recited from any or every claim or demand as community property, and shall vest the same in the grantee as separate property. The grantor in all such deeds, or the party releasing such community interest or estate, shall sign, seal,

[5] Enacted in 1909.

execute and acknowledge the deed as a single person, without the joinder therein of the married party therein named as grantee: Provided, however, that the conveyances or transfers hereby authorized shall not affect any existing equity in favor of creditors of the grantor at the time of such transfer, gift, or conveyance: And provided further, that any deeds of gift conveyances or releases of community estate by or between husband and wife heretofore made, but in which the husband and wife have not joined as grantors, said deeds, where made in good faith and without intent to hinder, delay, or defraud creditors, shall be and the same are hereby fully legalized as valid and binding.

SEC. 10575. POWER OF ATTORNEY TO CONVEY COMMUNITY PROPERTY.—A husband may make and execute a letter of attorney to the wife, or the wife may make and execute a letter of attorney to the husband, authorizing the sale or other disposition of his or her community interest or estate in the community property, and as such attorney in fact to sign the name of such husband or wife to any deed, conveyance, mortgage, lease, or other encumbrance, or to any instrument necessary to be executed by which the property conveyed or transferred shall be released from any claim as community property. And either said husband or said wife may make and execute a letter of attorney to any third person to join with the other in the conveyance of any interest either in

separate real estate of either, or in the community estate held by such husband or wife in any real property. And both husband and wife owning community property may jointly execute a power of attorney to a third person authorizing the sale, encumbrance, or other disposition of community real property, and so execute the necessary conveyance or transfer of said real estate.

SEC. 10577. BONA FIDE PURCHASER PROTECTED BY RECORD TITLE, WHEN.—Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same to an actual bona fide purchaser, a deed of such real estate from the person holding such legal record title to such actual bona fide purchaser shall be sufficient to convey to and vest in such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor's office of the county in which such real estate is situated.

SEC. 10578. CLAIM IN COMMUNITY REALTY TO BE FILED, WHEN.—A husband or wife having an interest in real estate, by virtue of the marriage relation, the legal title of record to which real estate is or shall be held by the other, may protect such interest from sale or disposition by the husband or wife, as the case may be, in whose name the legal title is held, by causing to be filed and recorded in the auditor's office of the county in which

such real estate is situated, an instrument in writing setting forth that the person filing such instrument is the husband or wife, as the case may be, of the person holding the legal title to the real estate in question, describing such real estate and the claimant's interest therein; and when thus presented for record such instrument shall be filed and recorded by the auditor of the county in which such real estate is situated, in the same manner and with like effect as regards notice to all the world, as deeds of real estate are filed and recorded. And if either husband or wife fails to cause such an instrument to be filed in the auditor's office in the county in which real estate is situated the legal title to which is held by the other, within a period of ninety days from the date when such legal title has been made a matter of record, any actual bona fide purchaser of such real estate from the person in whose name the legal title stands of record, receiving a deed of such real estate from the person thus holding the legal title, shall be deemed and held to have received the full legal and equitable title to such real estate free and clear of all claim of the other spouse.

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